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ALEXANDER L. STEVAS,
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80-1801

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

OVERSEAS RALEIGH MANUFACTURING, LTD.,

Petitioner,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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(10901)

QUESTIONS PRESENTED

(1) Did the New York State Courts erroneously rule that a Shipper's defense and counterclaim against an Air freight Carrier bottomed on common law fraud which did not attack the validity or reasonableness of the tariffs involved were nonetheless preempted and unavailable as a matter of law, perforce of federal statute and decision when, as judicially noted, the facts "virtually conceded" show:

> That the Carrier's (Pan American's) Director of Overseas Operations in order to have the Shipper (Raleigh) transfer its air freight business from another Carrier (KLM), misled the Shipper by deceptively representing that "there were applicable government order tariffs or special commodity tariffs from Frankfurt, that would fit his business and put it within the unit cost he was looking for" and thereby induced the Shipper to make a unit rate agreement, which agreement upon the termination of the air freight business many months thereafter, was then repudiated by the Carrier as contrary to its alleged Bucharest filed tariff kilo rates?*

*The unit rate agreement was made in Europe. Pan Am carried the merchandise by truck to Frankfurt and then by plane to New York.

(2) Was the Shipper's defense and counterclaim bottomed on the Air Freight Carrier's fraud properly rejected as matter of law, notwithstanding that the Federal Aviation Act (49 USC §1506) provides that "nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law" and that "the provisions of this Act are in addition to such remedies"?

(3) Was summary judgment properly granted, without trial, against the Shipper for $293,558.32, the excess of the Bucharest kilo freight rate over the agreed Frankfurt shipment unit rate the shipper actually paid to Pan American?

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

OVERSEAS RALEIGH MANUFACTURING, LTD.,

Petitioner,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF
THE STATE OF NEW YORK

Overseas Raleigh Manufacturing, Ltd. ("Raleigh") prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York dated November 18, 1980, re-argument denied January 20, 1981, which

modifies the order of the Appellate Division by dismissing Raleigh's second and third counterclaims and affirms the dismissal of its defense bottomed on alleged fraud.

OPINIONS BELOW

The two opinions at nisi prius by Mr. Justice Hughes at Special Term hereto annexed (pp. 1a-8a, infra) are unreported. The initial opinion after noting that the facts are "virtually conceded" by Pan Am holds basically that "neither intentional nor accidental misstatement of the applicable tariff rates will bind carrier or shipper" and that "no act or omission of the carrier" can be asserted by way of estoppel even though the application of "these rules may seem inequitable" (p. 6a, infra). The second opinion denied summary judgment to the carrier Pan Am on the ground

that its agent Basso's "representation of a future filing of a special contract unit weight tariff" is "a question for the jury"* (p. 2a, infra).

The opinion at the Appellate Division hereto annexed (pp. 9a-16a; infra) is reported at 73 A.D.2d 879, Case No. 5; 424 N.Y.S.2d 1. That Court basically held that the shipper Raleigh in asserting its defense and counter-claim bottomed on fraud "is endeavoring to do indirectly that which it is barred by law from doing directly" (p. 15a, infra).

The opinion of the Court of Appeals hereto annexed (pp. 17a-21a, infra) is reported in 51 N.Y.2d 960; 435 N.Y.S.2d

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* Mr. Basso Pan Am's Director of Overseas Operations testified that he told the shipper Raleigh's representative that "there were applicable government order tariffs, or special commodity tariffs from Frankfurt that would fit his business and put it within the unit cost he was looking for" (pp. 9, infra).

703 and basically holds that "tariffs are binding upon shipper and carrier regardless of the shipper's lack of actual knowledge of their provisions" and sustains the "legal considerations, aptly articulated" by the Appellate Division (p. 20a, infra).

In seeking reargument we contended that neither in the Court of Appeals nor the Courts below "did we challenge the legal proposition that tariff rates are binding upon shipper and carrier regardless of the shipper's lack of actual knowledge of their provisions". We contended that "the gist of Raleigh's defense and counterclaim asserting fraud is that it relied on the statements of Basso Pan Am's Director of Overseas Operations" that there were special tariff rates in Frankfurt "that could be utilized to accommodate Raleigh's shipments" at unit rates; that Raleigh's

garments were thereafter trucked by Pan Am to Frankfurt and the agreed unit rates were then paid for many months thereafter until the termination of the parties relationship. Reargument was denied by the Court of Appeals on January 20, 1981 (p. 21a, infra).

JURISDICTION

The judgment of the Court of Appeals was entered on November 18, 1980. Reargument was denied on January 20, 1981 (p. 21a, infra). The petition for certiorari is filed within 90 days of that date. Jurisdiction is invoked under 28 USC § 1257 (3).

FEDERAL STATUTE INVOLVED

The Federal Aviation Act (49 USC § 1506) provides:

> §§ 1506. Remedies not exclusive. - Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies. (Aug. 23, 1958, P.L. 85-726, Title XI, § 1106, 72 Stat. 798.)"

STATEMENT OF THE CASE

As the opinion at nisi prius indicates, the facts are "virtually conceded by plaintiff" Pan American World Airways, Inc. [Pan Am] (p. 5a*).

Raleigh imported clothing from Roumania. Its President, Henry Shapiro, travelling with an associate, Peter King, to Bucharest in February, 1976 on business (A-45**) were approached in flight by Joseph Basso, "Pan American's Director of Overseas Operations, Roumania." Basso was aware, according to Raleigh's President, that "we were interested in shipping freight from Roumania to the United States" (A-45) and that Raleigh was using the services of Royal Dutch Airlines (KLM), but was amenable to doing business with Pan Am

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* These page references are to the Court's opinion hereto annexed. All emphasis supplied, unless otherwise noted.

**These references are to the Petitioner's Appendix.

"on a unit price basis" for shipping its garments "in hanging containers" (A-45). Basso recognized Raleigh's need for a "unit rate arrangement"; Basso testified:

> "They needed, you know, to keep it within the unit cost, to, of course, to sell to their customers, I guess. It's easier to do that than to sell them cargo by kilo." (RA-13*)

At a meeting in Pan Am's office in Bucharest, further discussions were had (A-46). Raleigh's claim of fraud is bottomed on this testimony, given in discovery proceedings by Pan Am's Director of Overseas Operations, Mr. Basso, who admitted:

> "I told them there were applicable government order tariffs, or special commodity tariffs from Frankfurt, that would fit his business and put it within the unit cost he was looking for, that I would need more information, because they are not published tariffs in the common tariff manual. They are special tariffs that are usually found in manuals located at the destination points or origin points, which the common carriage encompasses." (RA-8)

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* These references are to the Respondent's Appendix.

Mr. Basso assured Raleigh's President that the goods were to be shipped in hanging containers and that after checking "with Frankfurt on the special tariffs" he would "get back to us" (A-47). Thereafter, Basso said he had been in touch with Pan Am's cargo expert in Frankfurt and that Pan Am could accommodate Raleigh's shipments "but at a rate slightly higher than $1.10 per unit" and that he had advised Pan Am's Frankfurt cargo man that Raleigh was dealing with KLM and that he [Basso] wanted to obtain the business (A-48). Evidently, Pan Am's Director of Overseas Operations had satisfied himself as to Pan Am's right to make a unit rate arrangement; he acknowledged:

> "We told Mr. Shapiro that we couldn't carry the suits for $1.10, but that -- I think we asked initially $1.40 or $1.35, and then we compromised at $1.25." (RA-10-11)

Equally significant is the fact that Pan Am paid all costs of trucking Raleigh's

garments from Bucharest to Frankfurt, from which the carrier shipped them by air freight to New York (A-49). Pan Am's representative Basso testified:

> "Q They were trucked to Frankfurt?
> A That's right.
> Q They were laid on the floor?
> A Yes." (RA-23-4)

Because of the controversy that later developed by reason of Pan Am's failure to make proper delivery of the garments on hangers, causing substantial expense to Raleigh (A-148-9), the parties came to a parting of the ways. Suffice it, in that connection, to note that Mr. Basso, Pan Am's Overseas representative, had reaffirmed the unit rate agreement:

> "I said to them, any business we started in the meantime, we would finish, any trucks, goods moving, we would carry all the stuff we were committed to.
> Q At the agreed upon rate?
> A At the agreed upon rate." (A-71)

The agreed unit rate, as the facts "virtually conceded" show, was paid and accepted "for many shipments made over a period of many months". (A-13)

It was only after the termination of this air freight business that Pan Am sued Raleigh alleging that between January 1, 1976 and February 2, 1977, Pan Am "rendered air freight services" at the defendant's special instance and request "as consignee thereof, at plaintiff's posted tariff rates in the aggregate amount of $802,349.84" against which Pan Am acknowledged the receipt of "payments in the aggregate sum of $553,510.81 leaving the aggregate sum of $248,839.03 due and owing". (A-124-5). The amount allegedly due and owing was designated by Pan Am as the "under collection amount". (A-128)

Defendant Raleigh, as already noted, by way of defense and counterclaim pleaded that it entered into the unit rate agreement perforce of the misrepresentation made to its President by Mr. Basso, Pan Am's Director of

Overseas Operations, that "there were applicable government order tariffs or special commodity tariffs from Frankfurt, that would fit his business and put it within the unit cost he [Raleigh] was looking for" (p. 3, supra).

REASONS FOR GRANTING THE WRIT

THE STATE COURTS ERRONEOUSLY RULED THAT COMMON LAW FRAUD ASSERTED BY THE SHIPPER RALEIGH, PETITIONER HEREIN, WHICH DID NOT CHALLENGE THE VALIDITY OR REASONABLENESS OF THE TARIFF RATES RELIED ON BY THE CARRIER PAN AM, WAS NONETHELESS BARRED AND PREEMPTED BY FEDERAL STATUTE AND DECISION.

THE GRANTING OF SUMMARY JUDGMENT IN FAVOR OF THE CARRIER WITHOUT A TRIAL WAS ERROR AND A DENIAL OF DUE PROCESS.

In the enactment of the Federal Aviation Program and the Act, Congress did not intend to provide for tort liability but particularly specified that "nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or

by statute" and moreover, "the provisions of this Act are in addition to such remedies" (Federal Aviation Act, 49 USC § 1506). See also, Nader v. Allegheny Airlines, Inc., 512 F.2d 527, revd. on other grounds, 426 US 290, 48 LEd2d 643, 96 S Ct 1978.

Indeed this Court in Nader forecast the result and determination here sought (Cf. Universal Computer Systems v. Allegheny Airlines, Inc., 479 F. Supp. 639, 642, 643). Here petitioner Raleigh did not challenge the reasonableness or validity of Pan Am's filed kilo tariff rates for shipment from Bucharest.

As the facts "virtually conceded" show, Basso, Pan Am's Director of Overseas Operations, represented that "there were applicable government order tariffs or special commodity tariffs from Frankfurt, that would fit his business and put it within the unit cost he

was looking for" which "are not published tariffs in the common tariff manual" since they "are special tariffs that are usually found in manuals located at the destination points or origin points, which the common carriage encompasses" (RA-19) and evidently having checked into the matter as the Court at Special Term noted "Basso offered a unit rate for the shipment of its [Raleigh's] merchandise" and "Raleigh agreed and commenced making all of its shipments via plaintiff" (p. 5a, infra). Accordingly, Pan Am trucked Raleigh's garments to Frankfurt at its cost, from which they were shipped to New York (RA-20). Raleigh paid the unit rate which Basso acknowledged was "compromised at $1.25" (RA-10-11); (p. 8, supra).

In asserting its claim of common law fraud which induced Raleigh to enter into the unit rate agreement that Pan

Am subsequently repudiated, petitioner manifestly did not challenge the validity or reasonableness of Pan Am's filed Bucharest tariff rates for shipment to New York which were asserted and the basis upon which Pan Am was granted summary judgment for the excess of those rates over the unit rate contracted for and paid for the shipments from Frankfurt.

The situation here is unprecedented. Judicial reasoning sustaining our position is found in Hewitt-Robins v. Eastern Freight-ways, 371 US 84, 9 L Ed2d 142 (1962), treating with the provision of the Interstate Commerce Act, which also requires the filing of tariffs for land freight shipments. The issue there presented also involved the right to bring a common law action which it was claimed was barred by the Act. As the opinion indicates, "No attack is made upon either of the carrier's published

tariffs -- both are admittedly reasonable" (371 US at p. 86; 9 L Ed2d at p. 145). This Court held that "the survival of a damage claim for misrouting appears entirely consistent with the Act" and ruled:

> "This conclusion is buttressed by the fact that the allowance here of a damage action nowise hampers the efficient administration of the Act, unlike the allowance of such an action as to unreasonable rates. A misrouting claim does not jeopardize the stability of tariffs or of certificated routes, the sole issue being whether the carrier routed the shipment over the cheapest available route, or made a showing or adequate justification for not doing so. Moreover, the allowance of misrouting actions would have a healthy deterrent effect upon the utilization of misrouting practices in the motor carrier field, which, in turn, would minimize 'cease and desist' proceedings before the Commission. Finally, and not to be overlooked, the absence of any judicial remedy places the shipper entirely at the mercy of the carrier, contrary to the overriding purpose of the Act. The allowance of such actions would, on the contrary, give neither an unfair advantage." (371 US at p. 88, 9 L Ed2d at p. 146).

It is equally clear that to bar Raleigh's claim "bottomed on fraud" likewise operates to place the shipper, in the language of the foregoing authority,

"entirely at the mercy of the carrier", and we add, serves to place an enormous penalty upon the victim rather than the wrongdoer.

Moreover, the sanctioning of such common law claim of fraud and the recognition of the right to assert it, again to borrow from the foregoing authority, "would have a healthy deterrent effect" upon the carrier to refrain from the fraudulent practices for which it not only has received immunity by the dismissal of Raleigh's fraud claim, but has substantially profited thereby.

This case, we submit, finds no parallel or judicial precedent for the philosophy voiced by the New York Courts that a claim of fraud such as here asserted and established by facts "virtually conceded", must be rejected because to do so will enable Raleigh "to do indirectly that which it is barred by law from doing directly" (p.15a, infra).

Petitioner's claim of fraud presented triable issues that should not have been disposed of by summary judgment.

No affidavit of Basso or any other official of Pan Am was submitted negating petitioner's claim and charge of fraud. Raleigh's president asserted, and it was not denied, that "not one single air waybill upon which Pan Am seeks to recover reflects that the goods travelled from Frankfurt" (A-53). This was substantiated by petitioner's predecessor counsel who stated under oath that he "personally checked each air waybill submitted by Pan Am" and "not one shows Frankfurt as the City of departure" and moreover each states that the "shipping charges were prepaid by Raleigh" and that "such acknowledgement of prepayment is in the nature of a receipt" (A-71).

Yet summary judgment was granted without a trial against the shipper for

$293,558.32, the excess of the Bucharest kilo freight rate over the agreed Frankfurt shipment unit rate that the shipper actually paid and which was accepted by Pan Am under the contract it induced petitioner to make.

Summary judgment is a drastic remedy; it does not entitle the court to try issues of fact. On such application the court is limited to deciding whether there are triable issues and in making that determination it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought. The moving party has the burden to demonstrate the absence of any factual issue (Adickes v. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); U.S. v. Bosurgi, 530 F.2d 1105, 1110 (1076)).

Moreover, under the modern doctrine recognized by the New York Court of

Appeals "a fraudulently expressed statement of the law" is actionable (Nat. Conv. Corp. v. Cedar Bldg. Corp., 23 N.Y.2d 621). Petitioner's claim of fraud against Pan Am would have been sustained except for the erroneous conclusion, as we have demonstrated, reached by the New York Courts that it was barred and preempted perforce of federal statute and decision.

CONCLUSION

The question here presented as to whether the shipper's claim of fraud is barred by federal statute and judicial decision thus imposing a penalty upon the victim rather than the wrongdoer we respectfully submit is of sufficient national importance and magnitude to warrant review by this Court.

Respectfully submitted,

Samuel Gottlieb
Attorney for Petitioner

APPENDIX

OPINION AT SPECIAL TERM

BY

MR. JUSTICE THOMAS J. HUGHES

DATED MARCH 27, 1979

Upon the foreging (sic) papers this Motion by plaintiff for further summary judgment by dismissing the three counterclaims of defendant Overseas Raleigh Manu. Ltd. and for other relief. Previously summary judgment was granted to plaintiff against this defendant based upon the underpaid sum of money due under plaintiff's published tariff rates, with the entry of judgment held in abeyance pending determination of the counterclaims. Summary judgment is denied on the first counterclaim as the issue whether the alleged statements by plaintiff's representative of a future filing of a special contract unit weight tariff is a

representation of fact or a promise or opinion, which is a question for the jury (Quinlan v. Consol. Edison Co., 26 A D 2d 913). Summary judgment is also precluded on the second and third counterclaims as there is an issue of fact whether a special contract for unit weight was entered into, its terms, and the amount of damages, if any. The entry of the judgment previously rendered to plaintiff shall be further held in abeyance pending a trial resolution of the counterclaims. Settle order.

OPINION AT SPECIAL TERM

BY

MR. JUSTICE THOMAS J. HUGHES

DATED JANUARY 30, 1979

Motions numbered 120 and 130 on the calendar of December 28, 1978 are consolidated for disposition. Defendant Kowa American Corp. (Kowa) moves for summary judgment dismissing plaintiff's complaint as to movant. Plaintiff moves for summary judgment against Overseas Raleigh Manufacturing, Ltd. (Raleigh) and requests that its claim against Kowa be severed.

In its complaint against both defendants, it is alleged that plaintiff provided air freight services to defendants, as consignees, at their special instance and request. Defendant Kowa

has established, by the testimony of plaintiff's own employees, that it had never requested plaintiff to provide any air freight service. Not one of the dozens of air waybills provided by plaintiff name Kowa as consignee. Accordingly, Kowa's motion is granted and the complaint against it dismissed. This determination, however, is not to be considered a final judgment on the merits, and is not intended to bar a new action which may be timely commenced by plaintiff employing a different theory of liability (Cf. Kavanau v. Virtis Co., 32 A.D. 2d 754 [1st Dept. 1969]).

Plaintiff's action seeks the excess of its air freight charges for many shipments made over a period of many months over the amount actually paid.

Defendant Raleigh's chief defense, the facts of which are virtually conceded by plaintiff, is that Joseph Basso, plaintiff's Director of Overseas Operations in Roumania, negotiated with Raleigh in an attempt to have Raleigh transfer its air freight business from another airline to plaintiff. As a result of such negotiations, Basso offered plaintiff a per unit rate for the shipment of its merchandise. Raleigh agreed and commenced making all of its shipments via plaintiff. The agreed unit rate was all Raleigh ever paid, regardless of the fact that many of plaintiff's bills were for a larger amount. Plaintiff counters by arguing that Basso's actions were entirely without authorization and, in any event, the tariff (schedule of rates) promulgated by the Civil Aeronautics Board determined

the rate which the carrier must charge and the shipper must pay regardless of any purported agreement to the contrary. Plaintiff's position is correct. The rates imposed by the applicable tariff are not rates merely imposed by the carrier but are rates imposed by law. Estoppel may not be invoked as a defense against an action brought for the payment of charges based on tariff rates, and neither intentional not accidental misstatement of the applicable rates will bind carrier or shipper. No act or omission of the carrier can estop or preclude it from enforcing payment of its charges computed on tariff rates. See United States v. Associated Air Transport, Inc., 275 F. 2d 827 (5 Cir. 1960), and the cases and authorities therein assembled. While the application of these rules may seem inequitable

in a given instance, it is clear that they are necessary if the public policy of establishing equal charges by all carriers is to be implemented. Since defendant Raleigh does not controvert plaintiff's computation under the tariff of the charges which are the basis of this action, the Court has no choice but to grant plaintiff's motion for summary judgment against Raleigh.

Raleigh, however, has asserted various counterclaims, including one grounded in fraud based on Basso's misrepresentations. Since no motion has been directed to the counterclaims, the Court will make no determination as to their sufficiency on merit. The entry of plaintiff's judgment on its cause of action against Raleigh shall be held in abeyance pending determination of

Raleigh's counterclaim (CPLR 3212[e]; Gunsberg v. Cantor, 24 AD 2d 999 [2nd Dept. 1965]).

Settle order.

PAN AMERICAN WORLD AIRWAYS, INC.,

v.

OVERSEAS RALEIGH MANUFACTURING, LTD., et al.

73 A.D. 2d 879

424 N.Y.S. 2d 1

Order of the Supreme Court, New York County, entered April 20, 1979 denying plaintiff's motion to dismiss defendant's three counterclaims modified, on the law, without costs, to the extent of dismissing the first counterclaim and reducing the second and third counterclaims by the sum of $248,839.03 and otherwise affirmed. Order of the Supreme Court, New York County, entered February 14, 1979 granting summary judgment to plaintiff in the sum of $248,839.03, with interest thereon from February 2, 1977 and holding

the entry of judgment in abeyance pending the determination of defendant's counterclaims modified, on the law, without costs, to stay only so much thereof as the amount sued for in defendant's second and third counterclaims exceeds the amount of plaintiff's judgment, and otherwise affirmed. Plaintiff (Pan Am), an overseas airfreight carrier, sues to recover for charges incurred in the shipment of clothing by defendant Raleigh from Roumania to New York. The total charges, according to plaintiff's posted tariffs, was $802,349.84. Payments aggregating $553,510.81 were made on account, leaving due a balance of $248,839.03. Pan Am instituted this suit to recover that balance. Raleigh contends that prior to the entry into the agreement of carriage with Pan Am it shipped the clothing manufactured

for it from Roumania to New York via KLM. It asserts that during its negogiations with Pan Am, Raleigh made clear that it would be willing to transfer its shipping business from KLM to Pan Am only if Pan Am could better the KLM price. Ultimately, claims Raleigh, a unit price agreement was entered into under which Pan Am was to charge $1.25 per unit for suits and $1.00 per unit for blazers. It is undisputed that Pan Am's filed tariff provides only for shipment by weight. To bring the unit charge within the required tariff Pan Am and Raleigh arrived at the weight of an average container. By apportioning the weight of that container among suits and blazers in a fixed ratio, Pan Am was able to arrive at a unit cost consistent with its filed weight tariffs. However, the reckoning of the average

container weight proved faulty because Raleigh shipped a disproportionate number of the substantially heavier suits. Hence, the airway bills which were based on weight only, in accordance with Pan Am's tariffs, were considerably higher than they would have been had they been based upon the unit price. Raleigh was billed for the balance of $248,839.03. When it refused to pay, Pan Am instituted this suit. In addition to denials and affirmative defenses, Raleigh interposes three counterclaims. The first is bottomed on alleged fraud and demands damages of $248,839.03, the precise amount sued for by Pan Am. The second counterclaim avers that Pan Am agreed to trasport all shipments simultaneously delivered to it in the same aircraft, that it hang all such goods in special containers and that it failed to do so with

resultant damage to Raleigh in the sum of $350,000. The third and final counterclaim is a reiteration of the second with a change of theory from that of breach of contract to negligence. Following completion of discovery Pan Am moved for summary judgment. That motion was granted. However, Special Term stayed the entry of judgment pending disposition of the counterclaims. Raleigh appeals from so much of the order as granted summary judgment while Pan Am cross-appeals from so much of the order as stayed the entry of judgment pending disposition of the counterclaims. Thereafter Pan Am moved to dismiss the counterclaims. That motion was denied by Special Term and Pan Am has appealed therefrom. Under the Federal Aviation Act (US Code, tit 49, § 1301 et seq.) all air carriers, foreign and domestic,

are required to file tariffs with the Civil Aeronautics Board (US Code, tit 49, § 1373, subd [a]) and no shipper "shall knowingly pay, directly or indirectly *** any greater or less or different compensation for air transportation of property, or for any service in connection therewith, than the rates, fares, and charges specified in currently effective tariffs applicable to such air transportation" (US Code, tit 49, § 1373, subd [b], par [2]). A tariff filed in compliance with the law constitutes the contract of carriage between the parties (Vogelsung v. Delta Air Lines, 302 F2d 709, cert den 371 US 826). It is "the sole standard for services to be rendered and charges assessed and collected". (United States v. Associated Air Transp., 275 F2d 827, 832.) If follows therefrom that re-

gardless of any contract alleged to have been made between the parties plaintiff was required to collect and defendant to pay the charges specified in the appropriate filed tariffs. Accordingly, the motion for summary judgment was properly granted. With respect to the counterclaims it is apparent that Raleigh is endeavoring to do indirectly that which it is barred by law from doing directly. The first counterclaim seeks recoupment of the exact amount sued for based upon the assertion of fraud and deceit. From the bill of particulars it is plain that the sum for which Pan Am recovered judgment is part of the second and third counterclaims as the "Difference between the amount claimed by plaintiff and cost otherwise available to Raleigh". Since this item of $248,839.03 may not be used as a setoff

it is not available as a counterclaim. Thus, the first counterclaim must be stricken as must so much of the second and third counterclaims as include this sum as an item of damage. In light of the striking of the first counterclaim and so much of the second and third counterclaims as seeks recovery of the sum of $248,839.03, the stay contained in the order entered February 14, 1979 must be modified accordingly.

Dated January 17, 1980

STATE OF NEW YORK

COURT OF APPEALS

----------X

No. 534

PAN AMERICAN WORLD AIRWAYS, INC.,

Respondent-Appellant,

v.

OVERSEAS RALEIGH MANUFACTURING., LTD.,

Appellant-Respondent.

----------X

PAN AMERICAN WORLD AIRWAYS, INC. v. OVERSEAS RALEIGH MANUFACTURING, LTD., 51 N.Y. 2d 960 435 N.Y.S. 2d 703

(534) Samuel Gottlieb, Milton Shalleck & Shelley L. Wallace, NY City, for cross-appellant Overseas Raleigh,

John L. Conners, NY City, for Pan Am as cross-appellant.

Jacob Oliner, NY City, for

Pan Am as respondent.

MEMORANDUM:

On cross-appeals, the resettled order of the Appellate Division should be modified to dismiss the defendant's second and third counterclaims in their entirety and to vacate the stay of the execution of the judgment granted to the plaintiff, and it is otherwise affirmed, with costs to the plaintiff. Accordingly, the question certified is answered in the negative.

The second counterclaim, for breach of contract, alleges the defendant shipper was damaged by plaintiff carrier's breach of an agreement to transport the goods on one aircraft and on one waybill and to hang them in special containers.

The third counterclaim in essence casts the same charge in a negligence pleading mold. It is a complete and dispositive answer to each of these counterclaims that no written notice of claim was presented by the defendant within the time limitations called for by Rule 23 B of the tariffs plaintiff, as an air carrier, was required to file pursuant to federal law (see Federal Aviation Act of 1958, 49 USCA §130 1 et seq). Constituting the written contract of carriage under a regulatory scheme in which Congress has preempted this field (Crosby & Co. v. Air France, 76 Misc 2d 990, affd 42 AD 2d 1050, cert den 416 US 486; Lichten v. Eastern Airlines, Inc., 189 F 2d 939, 941), the tariffs are binding upon shipper and carrier, regardless of the shipper's lack of actual knowledge of their provisions

(see Butler's Shoe Corporation v. Pan American World Airways, Inc., 514 F 2d 1283; Tishman & Lipp, Inc. v. Delta Air Lines Inc., 275 F Supp 471, affd 413 F 2d 1401).

Similar legal considerations, aptly articulated in so much of the Appellate Division's memorandum as dismisses the first counterclaim and upholds Special Term's grant of summary judgment on the plaintiff's affirmative cause of action, compel us to support those determinations.

****

Order modified, with costs to plaintiff, in accordance with the memorandum herein and, as so modified, affirmed. Question certified answered in the negative. All concur.

Decided November 18, 1980

1 Mo. No. 1364 PAN AMERICAN WORLD AIRWAYS, INC., Respondent, v. OVERSEAS RALEIGH MANUFACTURING, LTD., Appellant.	Motion for re-argument or for amendment of remittitur denied with twenty dollars costs and necessary reproduction disbursements.

Dated January 21, 1981

Office-Supreme Court, U.S.
FILED
MAY 26 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1801

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

OVERSEAS RALEIGH MANUFACTURING, LTD.,

Petitioner,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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(11034)

QUESTION PRESENTED FOR REVIEW

Whether a shipper possesses a remedy for an air carrier's alleged fraudulent misquotation of its tariff rates in an action by the carrier to enforce its lawful tariffs.

No. 80-1801

In The

SUPREME COURT OF THE UNITED STATES

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-against-

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No. 80-1801

In The

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PAN AMERICAN WORLD AIRWAYS, INC.,

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BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT OF THE CASE

Petitioner, Overseas Raleigh Manufacturing, Ltd., seeks a writ of certiorari to the Court of Appeals of the State of New York to review a decision of that Court holding petitioner liable for the charges specified in the filed tariffs of respondent, Pan American World Airways, Inc., and affirming the dismissal of petitioner's counterclaim sounding in fraud. (17a-20a).*

Course of the Proceedings

This action was commenced by respondent in the Supreme Court of the State of New York for judgment in the sum of $248,839.03, representing the difference between respondent's posted tariffs for the shipment of clothing by petitioner

*References in the form "__a", e.g., "17a", are to petitioner's appendix; references in the form "__ra" are to respondent's appendix.

between Frankfurt, Germany and New York and the payments made by petitioner for those shipments. Petitioner interposed a counterclaim for the precise amount demanded by respondent, alleging that respondent had perpetrated a fraud by failing to inform petitioner that an alleged oral "unit rate agreement" made by the parties was unlawful and in violation of respondent's tariffs.

Dispositions Below

In two unreported opinions (1a-8a), nisi prius held petitioner liable for the unpaid portion of respondent's tariff, but denied summary judgment to respondent on the counterclaim. On cross-appeals, the Appellate Division affirmed the grant of summary judgment in favor of respondent and held that petitioner was barred from interposing its counterclaim as it

constituted an impermissible attack on the validity of the tariffs. 73 App. Div. 2d 879 (1st Dep't 1980) (9a-16a). The New York Court of Appeals affirmed the relevant portions of the order of the Appellate Division, 51 N.Y.2d 960 (1980) (17a-20a), and denied petitioner's motion for reargument on January 20, 1981 (21a).

Statement of Facts

Respondent is an international air carrier duly certified under the Federal Aviation Act, 49 U.S.C. §§ 1301, et seq., and operating under and subject to the rules and regulations of the Civil Aeronautics Board and Federal Aviation Administration. Petitioner is an importer of ready-made clothing from Roumania.

In or about February, 1976, Henry Shapiro, president of petitioner, and a Mr. King, while in-flight to Bucharest

were approached by Joseph Basso, respondent's Roumanian cargo representative, for the purpose of solicitation of air freight business. Shortly thereafter, Messrs. Shapiro and King met with Basso in Bucharest. Shapiro informed Basso that petitioner would be willing to transfer its air freight business from KLM Royal Dutch Airlines to respondent if a satisfactory arrangement could be made.

Although informed that respondent's tariff provides for transportation charges only by weight, Shapiro requested a quote of the cost of transportation by garment unit based upon the estimated weight of each shipment. Basso informed Shapiro and King that respondent's tariff rates from Bucharest were not "competitive" (8 ra), but that he would explore the possibility of shipping the goods from Frankfurt, Germany (after trucking

them there at respondent's expense), where special commodity rates for large tonnage shipments might be available. (Id.) Based upon information supplied by Shapiro, Basso established the weight of the garments (suits and blazers) for the purpose of computing the unit cost of shipment within respondent's filed tariff rates. (11a).

Thereafter, Shapiro and Basso travelled to Frankfurt to determine the ultimate freight cost on a unit basis based upon the tonnage rate of respondent's special commodity tariff between Frankfurt and New York. Based upon information supplied by Shapiro, respondent apportioned the weight of each container to be transported among suits and blazers in a fixed ratio to arrive at a unit cost consistent with its filed weight tariffs. (11a, 13ra-17ra). That

the parties intended the cost of transportation at all times to be based upon the tonnage rate of respondent's special commodity tariff between Frankfurt and New York is made plain by the pretrial testimony of petitioner's president, Henry Shapiro (Respondent's Appendix before New York Court of Appeals, at 1):

> Q. I am asking you again what you told him. [Shapiro told Basso]
>
> MR. GALLAGHER (Petitioner's attorney): What did you tell him?
>
> A. I told him, this is how much suits [sic] I manufacture in Roumania. He says, if he could get that kind of load factor he would handle it at $1.25 and $1. He said, at that tonnage rate. (Emphasis supplied.)
>
> Q. What was your quantity that you manufactured, that you told him?
>
> A. A minimum of ten to fifteen thousand suits a week, a minimum.
>
> Q. How much did that come to in weight?
>
> A. I don't know.

Q. Did you tell him how much a suit weighed?

A. No, that's his job.

Q. Did he know how much a suit weighed?

A. That is how he came to the rate of $1. and $1.25, he weighed the garments. (Emphasis supplied.)

Petitioner actually shipped a disproportionate number of heavier garments than it had represented would be shipped. Hence, the underpinnings of the unit price agreement, which was based upon petitioner's shipment of lightweight garments, did not comport with respondent's filed tariffs. Accordingly, respondent's air waybills, which were based upon weight only in accordance with its tariffs, were higher than they would have been based upon the unit price. (11a-12a).

On November 15, 1976, fearing that the actual unit prices of each garment

would not average out in conformity with respondent's filed tariffs, Basso sent a telex to petitioner, requesting advice as to the status of the shipments of lightweight sport coats and blazers upon which the unit price figures had been based, and when no reply was received, repeated the inquiry on November 22, 1976. Having received no substantive response to these two telexes, Basso advised petitioner on December 21, 1976 that effective January 1, 1977 all shipments would be rated by actual weight. He finally advised petitioner that all further shipments would be stopped. Thereupon petitioner responded by telex that "we will be in Bucharest" on January 13, 1977, and would meet with Basso and asked him "do not do anything hastily" to interrupt the flow of shipments. Basso testified that in that meeting Shapiro agreed to pay the

freight charges by actual weight, but when petitioner thereafter refused to pay the amount specified in respondent's tariff, petitioner's credit was cancelled, and it was required to pay cargo charges at full tariff rates on all further shipments in advance by cash or certified check.

It is undisputed that the total freight charges, as measured by respondent's Frankfurt to New York special commodity tariff, amount to $802,349.84. It is similarly beyond dispute that petitioner paid respondent only the sum of $553,510.81, based upon its claim that the transportation charges were to be computed, not under the tariff, but rather pursuant to a separate unit rate agreement. In defense of this action by respondent to recover the difference between its published tariff rate and the

amount paid by petitioner, petitioner interposed a counterclaim "bottomed on common law fraud," demanding judgment in the precise amount sued for by respondent. The gravamen of this counterclaim was that petitioner relied on allegedly false statements of Basso that there were special tariff rates in Frankfurt that could be utilized to accommodate petitioner's shipments at unit rates, when in fact no such special tariffs existed.

In essence, then, petitioner seeks to enforce an alleged "unit rate" transportation agreement despite its concession that such charges could not be charged by respondent or paid by petitioner, as respondent's filed tariff rates, which as a matter of law constituted the contract of the parties, are based upon weight alone. While petitioner

professes not to "attack the validity or conclusiveness of the tariffs," it seeks to circumvent their conclusive effect by the simple expedient of interposing a "counterclaim bottomed on common law fraud."

In this regard, we respectfully submit that in framing its "Question Presented" to this Court, petitioner has misstated the undeniable facts in the record by presenting an inaccurate indented, single-spaced paragraph of "virtually conceded" facts (so as to create the false impression of a verbatim quote from the holding of an unidentified New York State Court). Two particularly misleading portions of that statement merit special response.

First, the underpaid freight charges respondent commenced this action to collect are not based upon the "Bucharest

filed tariff kilo rates," but the Frankfurt to New York tariff (tonnage) rate; and, second, the discussions in Frankfurt did not culminate in a "unit rate agreement," but were calculations to bring petitioner's per unit transportation costs within respondent's filed tonnage tariff from Frankfurt to New York. (11a-12a).

REASONS FOR DENYING THE WRIT

Petitioner has failed to demonstrate that the New York Court of Appeals has decided a federal question in a way to conflict with the decision of another state court of last resort or of a Federal court of appeals or that its decision presents an important, undecided question of Federal law. Sup. Ct. R. 17. Indeed, precisely the opposite is true. The decision of the Court of Appeals is unassailable, as it comports with numerous decisions of this Court, every Federal

court of appeals which has decided the issue presented in this petition and Federal law.

The essence of petitioner's argument may be readily distilled. Petitioner maintains that it shipped goods on respondent's flights in reliance on an alleged oral agreement for "unit" freight rates outside of respondent's admittedly valid tariff. Petitioner concedes, as it must, that the alleged agreement for "unit" rates is unenforceable as a matter of law. Barred from attacking the tariff itself, petitioner maintains that it was fraudulently induced to have respondent ship its goods as it relied on statements allegedly made by respondent's Roumanian cargo representative that the goods could be transported at a rate outside the applicable tariff.

As petitioner notes, the Court of Appeals held that petitioner's counterclaim, "bottomed on common law fraud," was nothing more than an attempt to attack the reasonableness of the tariff indirectly when it was barred from doing so directly (18a-20a). Petitioner maintains, however, that in so holding the Court of Appeals ignored the impact of section 1106 of the Federal Aviation Act, 49 U.S.C. § 1506, which provides:

> Nothing contained in this chapter [the Federal Aviation Act] shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies. (Emphasis supplied.)

By its plain terms, section 1106 merely provides that remedies existing at common law or some other statute at the time of the enactment of the Federal Aviation Act are not abrogated. What was

preserved, therefore, were "pre-existing remedies, not pre-existing obligations or rights or contractual arrangements." Mack v. Eastern Airlines, 87 F. Supp. 113, 115 (D. Mass. 1949) (Wyzanski, J.). Thus, only to the extent that Congress itself has not specified the rights and obligations of the parties to a contract of carriage or delegated the authority to do so to an administrative agency, may a common law action be maintained consistent with the purposes of the Act. Nader v. Allegheny Airlines, 426 U.S. 290, 298-300 (1978); Klicker v. Northwest Airlines, Inc., 563 F.2d 1310, 1314-15 (9th Cir. 1977).

In chosing to regulate all modes of transportation in interstate commerce, whether that industry be motor carriers, railroads, water carriers, or air carriers, Congress sought to combat the

pernicious effects of preferential treatment among shippers and price discrimination. Pittsburgh, C.C. & St. L. Ry. v. Fink, 250 U.S. 577, 581 (1919); North Am. Phillips Corp. v. Emery Air Freight Corp., 579 F.2d 229, 233-34 (2d Cir. 1978). To this end, every regulatory act contains a provision that the carrier's filed tariff, and the tariff alone, governs the rights and obligations of the parties to a contract of carriage.* Thus, a duly filed tariff,

> is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travellers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse

*49 U.S.C. §§ 6, 8, 9, 41-43 (railroads); 49 U.S.C. §§ 317, 318, 322 (motor carriers); 49 U.S.C. §§ 906, 916, 917 (water carriers). Indeed, failure of a carrier to charge the tariff rate subjects it to severe criminal penalties. 49 U.S.C. §§ 41-43, 1472(a).

> for paying or charging either more or less than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Louisville & N.R.R. v. Maxwell, 237 U.S. 94, 97 (1919) (emphasis supplied); accord, David v. Cornwell, 264 U.S. 560 (1924); Southern Ry. v. Prescott, 240 U.S. 632 (1916).

In the instant case, the rights and obligations of the parties are governed exclusively by the provisions of the tariff. Respondent was prohibited charging* and petitioner was prohibited from

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*49 U.S.C. § 1373(b)(1) provides, in pertinent part:

> No air carrier or foreign air carrier or any ticket agent shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates,

paying* any charge for the transportation of its goods which deviated from the

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> fares, and charges specified in then currently effective tariffs of such air carrier or foreign air carrier; and no air carrier or foreign air carrier or ticket agent shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extent to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs except those specified therein.

*49 U.S.C. § 1373(b)(2) provides:

> No shipper, consignor, consignee, forwarder, broker, or other person, or any director, officer, agent, or employee thereof, shall knowingly pay, directly or indirectly, by any device or means, any greater or less or different compensation for air transportation of property, or for any service in connection therewith, than the rates, fares, and charges specified in currently effective tariffs applicable to such air transportation; and no such person shall, in any manner or by any device, directly or indirectly, through any agent or broker, or otherwise, knowingly solicit, accept, or receive a refund or remittance of any portion of the rates, fares, or charges so specified,

tariff. Quite simply, the tariff constituted the entire contract of carriage between the parties. Once respondent transported petitioner's garments, petitioner assumed to pay the tariff and could not circumvent the liability imposed upon it by law in any respect. E.g., New York Cent. & H.R.R. v. York & Whitney Co., 256 U.S. 406, 408 (1921); Klicker v. Northwest Airlines, Inc., 563 F.2d 1310, supra; Tishman & Lipp, Inc. v. Delta Air Lines, 413 F.2d 1401, 1403 (2d Cir. 1969); Carter v. American Tel. & Tel., 365 F.2d 486, 496 (5th Cir. 1966), cert. denied, 385 U.S. 1008 (1967); United States v. Associated Air Transport,

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> or knowingly solicit, accept, or receive any privilege, favor, or facility, with respect to matters required by the Board to be specified in such tariffs, except those specified therein.

Inc., 275 F.2d 827, 832-34 (5th Cir. 1960); Slick Airways, Inc. v. United States, 292 F.2d 515, 519 (Ct. Cl. 1961).

Accordingly, respondent's valid federal tariffs, which petitioner concedes are applicable to the shipments at issue, govern not only the nature and extent of petitioner's obligations, but also the nature and extent of petitioner's remedy under 49 U.S.C. § 1506. Any remedy petitioner may possess is defined, as a matter of law, not by the common law, but within the boundaries of respondent's tariffs. New York Cent. & H.R.R. v. York & Whitney Co., supra; North Am. Phillips Corp. v. Emery Air Freight Corp., 579 F.2d at 233, supra.

Although petitioner maintains it does not seek to overturn respondent's lawful tariffs, its "counterclaim bottomed on fraud" seeks to accomplish that

that very purpose. Petitioner asserted below that respondent was guilty of a fraud due to the failure of its agents in Bucharest and Frankfurt to inform petitioner "that the 'unit rate agreement' was improper, in violation of Pan Am's tariff or beyond [their authority to make]." The simple answer to this allegation is that, even if true, it vests no remedy in petitioner as no claim for relief can be predicated on a carrier's alleged fraudulent misquotation of tariff rates or availability of rates outside its tariff. E.g., Consolidated Freightways Corp. v. Terry Tuck, Inc., 612 F.2d 465, 466 (9th Cir.), cert. denied, ___ U.S. ___, 100 S. Ct. 2990 (1980); Aero Trucking, Inc. v. Royal Tube Co., 594 F.2d 619, 622 (7th Cir. 1979); F. Burkhart Mfg. Co. v. Fort Worth & D.C. Ry., 149 F.2d 909 (8th Cir. 1945).

This elementary proposition has been established not only by every Federal court of appeals which has addressed the issue, but by this Court on numerous occasions as well. Starting from the principle that the applicable tariffs are incorporated by law into the contract between the shipper and carrier, this Court has held:

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made for all purposes the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

Keogh v. Chicago & Northwestern Ry., 260 U.S. 156, 163 (1922) (emphasis supplied); accord, Kansas City Southern Ry. v. Carl, 227 U.S. 639, 653 (1912) ("Neither the intentional nor accidental misstatement of the applicable published rate will

bind the carrier or shipper"); Louisville & N.R.R. v. Central Iron & Coal Co., 265 U.S. 59, 65 (1924) (no "act or omission of the carrier" can "estop or preclude it for enforcing payment of the full amount" of the tariff charges); Baldwin v. Scott County Milling Co., 307 U.S. 478, 485 (1939) ("equitable considerations may not serve to justify failure of carrier to collect, or retention by shipper of, any part of lawful tariff charges"); Texas & P. Ry. v. Abilene Cotton Oil Co., 246 U.S. 426, 446 (1907) (statute preserving common law remedies "cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act.")

It is thus obvious that petitioner's attempt to circumvent the conclusive

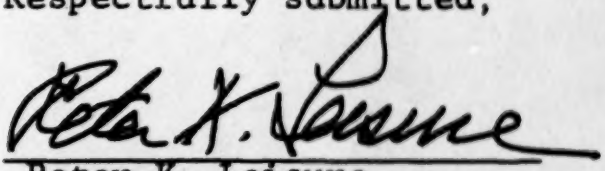
effect of respondent's lawful tariff must fail. This is not a case, as petitioner would have this Court believe, where the shipments were unauthorized or improperly diverted by the carrier. Hewitt-Robins, Inc. v. Eastern Freight-ways, Inc., 371 U.S. 84 (1962). Petitioner concedes that it engaged respondent to transport its goods from Frankfurt to New York and admits that the goods were so transported. In short, petitioner received precisely what it bargained for and became obligated to pay respondent its lawful tariff. As a matter of law, the tariff is both conclusive and exclusive; it may not be added to through reference to outside contracts, agreements, understandings or promises. Any attempt by petitioner to now undermine the conclusive effect of that tariff, whether by pleas of fraud, estoppel or breach of contract, cannot be

invoked to avoid the tariff. The settled proposition that common law right of action survives the enactment of the Federal Aviation Act to attack valid tariff rates is neither unprecedented nor novel and does not warrant review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,



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RESPONDENT'S APPENDIX

EXTRACT FROM PRETRIAL DEPOSITION OF JOSEPH BASSO

Q Who was present at that time?

A Mr. Shapiro and Mr. King.

Q And, again, this would be approximately in February of 1976?

A I think so.

Q Was there anyone else present from Pan American during this conference?

A I am not certain if Mr. Gaiculescu was there. Mr. Gaiculescu might have been there at that time.

Q Who is Mr. Gaiculescu?

A He is a Roumanian employee that does our accounting.

He also is knowledgeable with regard to cargo tariffs and tariff manuals, and has been trained in that by Pan American.

Q He is a Roumanian citizen?

A That's right, he is a Roumanian

citizen.

Q You don't recall whether he was present or not?

A No, I don't know. I really don't know.

Q Tell us, as best you can recall, the substance of that conversation?

A At that point we discussed quantities of textiles that were going to be shipped in the coming year for a period of, approximately--at first indication, it was, I believe, from May through the end of the year. And I took notes of the numbers of pieces and different styles, mainly the men's suits, blazers. I don't recall if there were ladies' blazers and men's blazers and pants. I still have most of those notes. And we discussed the unit price.

Mr. Shapiro, at that first meeting, said that there was considerable

tonnage, and that, by indications, that there was--by unit price he could afford at that time was, $1.10 per unit.

I said, I didn't know if it was possible for us to do it for $1.10, and we tried working figures--I know I did, but I am not certain if Mr. Gaiculescu was there--to fit this tariff structure, based on the weights of the garments that they were going to ship.

At that time my notes indicated that we were told the suits would weigh approximately 1.50 kilos, and that the blazers would weigh .7 kilos.

Q Do you know what that translates into in pounds?

A Approximately, a suit would weigh 3.2 pounds and a blazer would weigh 12-1/2 ounces.

Q Was there any discussion --

A I am sorry, no, it is more than

that. It was .7 kilos, so that would be approximately twenty ounces, twenty-one ounces.

Q Was there any discussion that the blazers would be hung with pants on them?

A No, there was no discussion at that point. The blazers were supposed to be shipped towards the end of the year, and that included in the discussion.

I think, in the month of--my notes state--I have some notes I took with me, copies of notes I took.

Q Can we have them please?

A It was to remind myself. Initially, the suits were supposed to be 48,000 suits for July, August, September and October, approximately 12,000 suits a week.

And the blazers were supposed to begin in October, and the numbers I show

in my notes were 80,000 blazers in October, 80,000, November, 80,000, December. These were blazers.

Then there were pants which were also involved. And we were told at that time there was 60,000 in September, 60,000 in October, 40,000 in November, and 120,000 in December.

Q The notes which you have in front of you, are those the notes you made at the meeting?

A No, these are notes that I took before I left Bucharest.

Q Do you have the actual notes that you took?

A Yes, I do.

Q Do you have them with you?

A No, I don't

MR. GALLAGHER: We would like to get a copy of them, Mr. Oliner.

MR. OLINER: You will.

Q These are notes you made from them?

A Yes, everything.

Q I note on there you show 1.25. What is that intended to indicate?

A After I was unable to conclude our negotiations in Bucharest, I am not sure if this is a result of the first meeting, because we had several meetings --

Q When you say first meeting, you are not talking about the airplane meeting?

A No.

Q You are talking now about the first meeting in your office?

A Yes.

Q Let's finish up with that meeting before we go on to the next one.

A Yes.

Q At that meeting, Mr. Shapiro

said he wanted a rate of $1.10 per unit?

A Yes.

Q What was your response to that?

A And thirty cents a unit for the pants. Mr. King seemed more interested in the pants. I don't know if that was his business and the other business was Mr. Shapiro's.

My answer to them was that I wasn't certain whether or not it could fit into our tariff schedule and I would have to do more investigation, looking into it. I didn't propose that we could go any further at that point.

Q During this initial meeting, did you review in any kind of detail the actual tariffs that were on file by Pan American?

A Yes, sir. We mentioned the cargo tariff from Germany, and we also mentioned at that time that there was a

tariff that we thought we could fit this business into from Frankfurt, that there definitely wasn't any way we could fit this business from our Bucharest tariff, because it was too high, it wasn't competitive.

Q I am not sure if I understand you. Do you mean that the tariff itself was too high?

A Yes. There wasn't any tariff covering largish movements of textiles from Roumania. There were tariffs only covering smaller shipments of textiles, and would have been much too high for the importer, for Mr. Shapiro to pay, it wasn't competitive.

Q Did you tell Mr. Shapiro or Mr. King what that tariff was?

A The one from Roumania?

Q Yes.

A Yes, I believe we discussed what

it was. It was two dollars a unit, a kilo.

Q You discussed it in terms of kilos rather than in terms of units?

A That's right. That is the way our tariffs are quoted, in kilos, and not quoted in units.

Q What did you tell them concerning the tariff from Frankfurt?

A I told them there were applicable government order tariffs, or special commodity tariffs from Frankfurt, that would fit his business and put it within the unit cost he was looking for, that I would need more information, because they are not published tariffs in the common tariff manual. They are special tariffs that are usually found in manuals located at the destination points or origin points, which the common carriage encompasses.

Q Did you tell Mr. Shapiro you would look into this further?

A Yes, I did.

* * *

Q How was that second meeting concluded?

A The second or third meeting--well, the next, the second meeting, we concluded that we would go to Frankfurt together and discuss this with our cargo people.

Q Did that, in fact, happen?

A Yes.

Q How long, approximately, after this meeting that you just described for us, did you go to Frankfurt?

A I think we went the next day.

Q Who went?

A Mr. Shapiro and myself.

Q When you arrived in Frankfurt, whom did you meet?

A We met with Mr. Moierer and with with Mr. Muller.

Q Where did that meeting take place?

A That took place in our cargo marketing office at the Frankfurt Airport.

Q And the four of you were present?

A Yes.

Q Now, to go back for a moment, during this second meeting with Mr. Shapiro, did you take any notes at that time?

A Yes, I believe I did.

Q Do you have copies of them with you?

A I don't have them with me, no. I can get you those copies. They are just scratched out, mostly dealing with the tariff and averaging out the weights

versus piece counts, et cetera.

Q Can you tell us, to the best of your recollection, what transpired at this meeting in the Frankfurt Airport?

A We went over the proposed figures, the quantities to be shipped, and the weights.

And we discussed the applicable thirty ton tariff and fifteen ton tariff. And we told Mr. Shapiro that we couldn't carry the suits for $1.10, but that--I think we asked initially $1.40 or $1.35, and then we compromised at $1.25, with Mr. Shapiro's assurance that the lighter garments would average out the weights and fit within the tariff that we were working with.

Q What was the tariff that you were working with in connection with the $1.25?

A The tariff we were working with,

I believe, was two Marks twenty.

Q Per kilo?

A Per kilo, that's right.

Q Is that the fifteen ton or thirty ton tariff?

A At that time I believe it was the thirty ton tariff. I have to review the tariffs to be sure of that.

Q You said earlier that these are some sort of special tariffs.

A That's right.

Q They are not generally available to the public?

A They are available to the public, but they are not published within the tariffs all over the world, they are published within the geographical area specifically.

They wouldn't have any value outside of Europe, for example, so they wouldn't be published outside of Europe.

Q How do you describe these tariffs?

A They are special commodity tariffs, filed by government to government, and they are to cover the movement of large quantities of a specific item of a specific nature.

Q Do you have flexibility in determining what the rate is that you will charge when you ship goods under this tariff?

A No. It is quite clearly defined that, in most cases, you have different weight trucks--give ton applicable tariff under a specific commodity, ten ton, twenty ton, maybe even thirty.

However, that changes. The changes usually are seasonal changes. And, each time it changes the government is required to file it with the other government, the corresponding government.

Q These are all tariffs, Germany to the United States?

A Yes. And, many times from the United States to Europe, and specifically commodity rates as they are called.

Q You are talking about shipments all going one way, you are not talking about any shipments going any other way?

A No.

Q There is no flexibility?

A No.

Q Then, how was it you were able to adjust the price from what was the original payment of $1.40 or $1.35, down to $1.25, that was eventually agreed upon?

A Because of the nature of the goods, and Mr. Shapiro's assurances that we would receive the lighter weight goods towards the end of the year, namely, the blazers, and the quantities of blazers,

and pants, trousers, which helped us to average out the price to $1.25.

Q The discussions at this time related to unit prices?

A That's right. That was mainly for the convenience of the importer. They needed, you know, to keep it within the unit cost, to, of course, to sell to their customers, I guess. It's easier to do that than to sell them cargo by kilo.